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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 178

TUSKEGEE INSTITUTE,
Petitioner,

v.

THE BANK OF NEW YORK, as Trustee of the Trust established by ARTHUR B. EMMONS by Indenture dated May 8, 1916, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

IN BEHALF OF RESPONDENTS RICHARD S. HUMPHREY, JR., JOAN HUMPHREY WATKINS, MARION HUMPHREY JACOBSON, ELIZABETH A. CURTIS, MARIE JOHNSON, AUGUST R. MEYER, HENRY H. MEYER, JR., MARY MEYER, GEORGE W. W. BREWSTER, JR., WILLIAM L. BREWSTER, HENRY BREWSTER, HARRIET TERRY, THEODORE O. BREWSTER, BENJAMIN BREWSTER, HENRY DAVENPORT, THE MERCHANTS NATIONAL BANK OF BOSTON AND HENRY HIXON MEYER AS TRUSTEES UNDER AN AGREEMENT AND DECLARATION OF TRUST DATED AUGUST 31, 1956 MADE BY HENRY DAVENPORT, ROBERT W. EMMONS, JR., CLARA EMMONS LEVY, GARDNER EMMONS, WILLIAM B. EMMONS, JR., NATHANIEL PARKINSON AS EXECUTOR OF THE ESTATE OF MARY E. PARKINSON, IRVIN McD. GARFIELD, JR., ELEANOR GARFIELD, JANE G. CHEEVER, SISTER FRANCES ELIZABETH OF ALL SAINTS, MARGARET EMMONS BULLITT, JR., AS EXECUTRIX OF THE WILL OF MARGARET E. BULLITT, GEORGE B. EMMONS, ELIZABETH EMMONS HOLMES, HARTFORD NATIONAL BANK & TRUST COMPANY, DOROTHY EMMONS SEBENIUS, MARTHA EMMONS FLYNN AND MARGARET EMMONS MILLER.

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TABLE OF CONTENTS

	PAGE
Statement	2
Prior Proceedings	2
Issues Presented	3
Facts	4
Official Referee's Opinion	5
Summary of These Respondents' Argument	6
Point I. This Court Lacks Jurisdiction Because the Purported Constitutional Question Neither Appears on the Record Nor Was Seasonably Raised in Accordance with the Requirements of New York Law	7
Point II. This Case Involves No Federal Constitutional Question But Only Questions of State Law	11
Conclusion	17

TABLE OF CASES

Allis' Will, In re, 6 Wis. 2d 1 (1959)	12
Barrows *v.* Jackson, 346 U. S. 249 (1953)	11
Brinkerhoff-Faris Co. *v.* Hill, 281 U. S. 673 (1930)	10
Brown's Petition, 14 R. I. 371 (1884)	15
Carroll, Matter of Joseph M., 305 N. Y. 692 (1953)	8
City of New Rochelle *v.* Closter, 296 N. Y. 506 (1946)	8

PAGE

Cross *v.* United States Trust Co., 131 N. Y. 330 (1892) ---- 13

Curtis *v.* Curtis, 185 App. Div. 391 (1918) ---- 12

Dodge *v.* Cornelius, 168 N. Y. 242 (1901) ---- 9

Edelman *v.* California, 344 U. S. 357 (1953) ---- 9

Equitable Trust Co. *v.* Prentice, 250 N. Y. 1 (1928) 12

Gibbons *v.* Mahon, 136 U. S. 549 (1890) ---- 15

Greene *v.* Smith, 17 R. I. 28 (1890) ---- 15

Home Ins. Co. *v.* Dick, 281 U. S. 397 (1930) ---- 14

Hutchison *v.* Ross, 262 N. Y. 381 (1933) ---- 13

Klaxon Co. *v.* Stentor Co., 313 U. S. 487 (1941) ---- 14

Kryger *v.* Wilson, 242 U. S. 171 (1916) ---- 11, 13

Lynch *v.* New York, 293 U. S. 52 (1934) ---- 7

Missouri *v.* Gehner, 281 U. S. 313 (1930) ---- 10

Nathan *v.* Equitable Trust Co., 250 N. Y. 250 (1929) ---- 9

Newport Trust Co. *v.* Van Rensselaer, 32 R. I. 231 (1911) ---- 15

Nickel *v.* Cole, 256 U. S. 222 (1921) ---- 15

Nod-Away Company *v.* Carroll, 240 N. Y. 252 (1925) ---- 8

Parsons *v.* Lyman, 20 N. Y. 103 (1859) ---- 13

Rhode Island Trust Co. *v.* Tucker, 51 R. I. 507 (1931) ---- 16

Sampson *v.* Channell, 110 F. 2d 754 (1st Cir. 1941), *cert. denied,* 310 U. S. 650 (1941) ---- 14

Seaboard Air Line Railway *v.* Duvall, 225 U. S. 477 (1912) ---- 7

Shannon *v.* Irving Trust Co., 275 N. Y. 95 (1937) 13

Shelley *v.* Kraemer, 334 U. S. 1 (1948) ---- 10

Tidal Oil Co. *v.* Flanagan, 263 U. S. 444 (1924) ---- 11

PAGE

AUTHORITIES

Cohen and Karger, Powers of the New York Court of Appeals (Rev. Ed., 1952) 8

Note: "Conflicting Claims of Life Tenant and Remainderman to 'All Stock—No Cash' Dividends," 46 HARV. L. REV. 298 (1933) 16

Restatement (~~Second~~), Conflict of Laws § 296 (~~1959~~) 14

STATUTES

28 U. S. C. § 1257(3) 7

N. Y. Civil Practice Act, Section 588(1)(a) 8

N. Y. Civil Practice Act, Section 589 8

United States Constitution

Article I, Section 8 ..... 3, 11

Amendment XIV 3, 11, 13

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Statement

This brief is submitted in behalf of all those respondents who are remaindermen of the *inter vivos* trust established by Arthur B. Emmons in 1916,—and the assignees of two such remaindermen—in opposition to the petition filed herein by Tuskegee Institute, a residuary legatee under the Will of Julia W. Emmons, seeking a writ of certiorari to the Court of Appeals of the State of New York.

The executor of the will of Julia W. Emmons and the other respondents herein, all being legatees under her will, have subsequently joined in the application.

Prior Proceedings

This proceeding was instituted by the Bank of New York, as trustee under an indenture made by Arthur B. Emmons on May 8, 1916 and as trustee under Mr. Emmons' will, for a judicial construction to determine, among other things, the proper disposition of certain distributions received by the two trusts in the form of stock of the issuing companies (referred to herein as "stock dividends") (R. 35-76).

In a written opinion, Hon. Felix C. Benvenga, Official Referee, at Special Term, Supreme Court of the State of New York, New York County, held that the discovery and effectuation of Mr. Emmons' intent called for application of the law and usage of Rhode Island, rather than that of New York, in determining the allocation of stock dividends to principal or to income. Accordingly, the Referee concluded that stock dividends should be allocated to principal in accordance with the Rhode Island rule of interpreta-

tion and construction rather than be subjected to possible apportionment between principal and income in accordance with New York's so-called *Osborne* rule (R. 191-199).

The order entered on the Referee's opinion (R. 190) was unanimously affirmed without opinion by the Appellate Division, First Department (R. 210-214). Leave to appeal to the Court of Appeals was denied by the Appellate Division (10 App. Div. 2d 707 (1960)) but granted by the Court of Appeals (R. 208-209), which then also unanimously affirmed without opinion (9 N. Y. 2d 808 (1961)). No constitutional question was raised at any time in the Supreme Court, the Appellate Division, or in either application for leave to appeal to the Court of Appeals (petition, p. 5).

No appeal was taken to the New York Court of Appeals from the determination that stock dividends received by the trust under Mr. Emmons' will were also to be allocated in accordance with the Rhode Island rule (R. 203-207).

The federal constitutional question sought to be raised by the petition was urged for the first time in the New York Court of Appeals (petition, pp. 5-6).

Issues Presented

The only issue which the petition seeks to raise is whether the determination below, that Rhode Island principles of interpretation and construction should be applied in seeking the intention of a Rhode Island settlor, was so irrational as to violate the "impairment of contracts" clause of Article I, Section 8, and the "due process" clause of the Fourteenth Amendment, of the United States Constitution.

A further issue concerns the timeliness of the raising of the alleged constitutional question.

Facts

The facts were stipulated (R. 158-181).

Arthur B. Emmons was born in Massachusetts in 1850. He graduated from the Harvard Law School in 1877, and in 1879 was admitted to the bar of Massachusetts, where he practiced for four years. Sometime between 1879 and 1891, he moved to Rhode Island, and remained domiciled in that state until his death in 1922 (R. 158, 159).

Mr. Emmons' widow and his only child also died domiciled in Rhode Island, his child in 1936 and his wife in 1956 (R. 159).

By indenture dated May 8, 1916, Mr. Emmons created an *inter vivos* trust, naming as trustee a New York bank of which his brother-in-law was a vice-president (R. 160). The indenture was executed in New York, and the trust property has at all times been held and administered in that state (R. 159).

The indenture provided that the trust "income" was to be paid to Mr. Emmons' wife so long as she lived and thereafter to his daughter for her lifetime. If the daughter were to die without issue, as she did, Mr. Emmons' nephews and nieces were named as a class as remaindermen (R. 78-81).

The indenture did not elaborate on the meaning of the word "income"; nor did it state—except as such might be implicit in the word "income" itself—whether stock dividends were to be treated as income or as

principal; nor did it specify the state whose law should govern the indenture's interpretation. In the indenture, however, Mr. Emmons identified himself as being "of Newport, Rhode Island" (R. 77) and made reference to New York law solely with respect to the trustee's commissions (R. 83).

Following the creation of the *inter vivos* trust in 1916 and until Mr. Emmons' death in 1922, correspondence passed between Mr. Emmons and the trustee pertaining to various aspects of the administration of the trust (R. 159-160). During this period various stock dividends were received by the trustee and were credited to and retained in the principal account of the trust (R. 163). It does not appear that Mr. Emmons ever questioned the retention of the stock dividends in principal (R. 177, 181, 195).

In 1922, shortly before his death, Mr. Emmons executed a will which provided for a residuary trust having substantially the same terms as the indenture insofar as here material and the same lone connection with New York—his brother-in-law's bank as trustee (R. 86-94, 192).

Stock dividends received in both the *inter vivos* and testamentary trusts continued to be retained in trust principal during the period from Mr. Emmons' death in 1922 until his widow's death in 1956. It does not appear that the widow ever made claim to any of them.

Official Referee's Opinion

In the only opinion rendered by the New York courts, the Honorable Felix Benvenga, Official Referee,

recited many of the foregoing facts (R. 191-192) and then declared (R. 193) that

> ". . . the problem here is one of interpretation or construction, the meaning of the language used in the trust instruments or the legal effect of such language."

as to which he then said (R. 193),

> "The presumption is that the settlor of a trust of personal property spoke the language of his home and intended the trust instrument to be interpreted and construed in accordance with the law and usage in his domicile."

After considering all the facts and circumstances surrounding the execution of the trust, he concluded (R. 195) that

> ". . . it is fair to assume that the settlor intended that the stock dividends should be allocated to principal in accordance with the Rhode Island rule."

Ample authority was cited in support of these premises and conclusions (R. 193-194).

Summary of These Respondents' Argument

Even if there were any constitutional question inherent in this litigation and the decisions of the New York courts—and none appears in the record—it was not seasonably raised and this Court therefore lacks jurisdiction to consider it (POINT I).

Quite apart from the failure of petitioner and the other respondents to raise any constitutional claim in timely fashion, the case involved issues of state law alone and presented no constitutional question whatsoever (POINT II).

POINT I.

This Court Lacks Jurisdiction Because the Purported Constitutional Question Neither Appears on the Record Nor was Seasonably Raised in Accordance with the Requirements of New York Law.

The rule has long been settled that this Court is without power under 28 U. S. C. § 1257(3) to review the determination of a state court for alleged violation of rights guaranteed by the Constitution of the United States where the federal question does not appear upon an examination of the record.

In *Lynch* v. *New York*, 293 U. S. 52 (1934), this Court said, at page 54:

> "* * *. But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record.
>
> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

See also *Seaboard Air Line Railway* v. *Duvall*, 225 U. S. 477 (1912).

Here, the federal question now raised by petitioner was raised neither in the pleadings nor elsewhere in

the record. Both the New York Court of Appeals and the Appellate Division unanimously affirmed without opinion the determination of the court of first instance, and the opinion of that court makes no mention of any federal question.

Petitioner concedes (petition, p. 5) that the federal question addressed to this Court was in fact raised for the first time on appeal to the Court of Appeals. Even there, incidentally, neither the executor of the will under which, as a residuary legatee, petitioner's claim is derived, nor any other of the residuary legatees under the same will found occasion to raise such a question. Neither was it raised in support of the applications for leave to appeal. It was, in fact, raised only in the briefs and on oral argument addressed to the merits of the appeal after leave had been granted.

Appeal to the New York Court of Appeals may be taken as of right if there be directly involved in a judgment of the Appellate Division a question under the Federal Constitution (New York Civil Practice Act, § 588(1)(a)); yet appellants did not claim such a right and, as already indicated, gained access to the Court of Appeals only through leave granted by the Court in its discretion (New York Civil Practice Act § 589; (R. 203-207)).

Under New York law the Court of Appeals uniformly refuses to consider a constitutional question unless raised in the lower court. *Matter of Joseph M. Carroll*, 305 N. Y. 692 (1953); *City of New Rochelle* v. *Closter*, 296 N. Y. 506 (1946); *Nod-Away Company* v. *Carroll*, 240 N. Y. 252 (1925). See Cohen and Karger, *Powers of the New York Court of Appeals* (Rev. Ed., 1952), pp. 251-252; 641-643.

Petitioner concedes this New York rule but argues (petition, p. 5) that it is limited to cases involving statutory interpretation. There is no such limitation, and this is as much apparent from petitioner's inability to cite authority for such a limitation as from the broad language used in the very cases cited by petitioner as representative of the New York rule. "Constitutional questions cannot for the first time be raised in this Court." *Nathan* v. *Equitable Trust Co.*, 250 N. Y. 250, 253 (1929); see also *Dodge* v. *Cornelius*, 168 N. Y. 242, 245 (1901).

Clearly the question could not have been presented to the Court of Appeals in accordance with the requirements of New York law, and it cannot be doubted, therefore, that that Court declined to pass upon the question. That it did not give any consideration to petitioner's claim of a constitutional issue is manifest from the absence of mention of any such claim in the official report of the Court of Appeals' affirmance (9 N. Y. 2d 808, 809).

Since the federal question was not seasonably raised in accordance with state law, this Court lacks jurisdiction now to consider it.

In *Edelman* v. *California*, 344 U. S. 357 (1953), the Court said, at page 358:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law."

In arguing that this Court nevertheless has jurisdiction, petitioner urges that it "was not bound at its

peril to anticipate that the New York court of first instance, or its Appellate Division (both being two parts of the same court) would without any rational basis in the stipulated record deprive it of vested property." (petition, p. 5.) But petitioner knew from the outset that the basic issue presented to the court by the trustee for determination was whether reference should be made to Rhode Island or New York law in interpreting the indenture so as to effectuate the settlor's intent (R. 74). Petitioner offers no persuasive explanation for its failure to present the purported constitutional question in the court of first instance and no explanation whatsoever for its failure to present the question on its appeal to the Appellate Division.

Petitioner's contention is not supported by any of the three decisions relied upon (petition, pp. 5-6). In *Missouri* v. *Gehner*, 281 U. S. 313 (1930) and *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930), the judicial decisions which violated constitutional rights were made in the first instance by the state's highest court. Here, if any violation of petitioner's constitutional rights occurred it was embodied in the decision of the court of first instance. And in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), the constitutional question, having been seasonably raised, was passed upon by the state's highest court.

This record discloses neither any federal question nor any serious doubt that the New York Court of Appeals properly declined to consider the constitutional question now urged. Accordingly, this Court lacks jurisdiction to consider it.

POINT II.

This Case Involves No Federal Constitutional Question But Only Questions of State Law.

Petitioner claims, in substance, that the decisions of the New York courts were so without rational basis that they violated the "impairment of contracts" clause of the Constitution and deprived petitioner of vested property rights without due process of law. Stripped to essentials, petitioner's claim is that the New York courts effected this alleged impairment of contract and deprivation of property rights by applying to the interpretation of an *inter vivos* trust executed in 1916 by a resident of Rhode Island for the benefit of Rhode Island beneficiaries, rules of construction customarily applied in Rhode Island. Incidental to this, the petition asserts that the New York courts were mistaken as to the stage of development of Rhode Island law in 1916, although petitioner does not deny that the Rhode Island rule as to the treatment of stock dividends has never been any different than the New York courts found it to be.

Petitioner's position is without merit on each point it seeks to make.

Petitioner's contention that the New York courts violated the "impairment of contracts" clause of the Constitution can be very summarily disposed of. The "impairment of contracts" clause is directed only against impairment by legislation and not by judgments of courts. *Barrows* v. *Jackson*, 346 U. S. 249, 260 (1953); *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451 (1924); *Krygier* v. *Wilson*, 242 U. S. 171, 177 (1916).

This is so unequivocal a rule that there is no need to pursue and expose the lack of any substance to petitioner's claim of contractual right, or its alleged impairment by action of the New York courts. Cf. *In re Allis' Will*, 6 Wis. 2d 1, 8 (1959).

No disregard of contractual or vested rights is remotely involved here, nor any failure of due process of law. This is purely and simply a case of trust interpretation or construction, the basic issue being whether the settlor intended stock dividends to be treated as principal or be allocated between principal and income. See *Equitable Trust Co. v. Prentice*, 250 N. Y. 1, 3, 9 (1928). No "property rule" is involved. Strictly speaking, the dispute does not even involve the conflict of laws. Rhode Island law and New York law were pertinent here only as guides to the New York courts in seeking the implied or probable or likely intention of the settlor.

In construing this instrument, the New York court determined that the settlor intended stock dividends to be treated as principal. His domicile in Rhode Island and his early background in Massachusetts (in both of which states it has long been presumed that settlors intend stock dividends to be treated as principal) were undoubtedly elements in the court's finding (R. 195). Adherence to the rules of interpretation and construction of the domicile in ascertaining a settlor's intention had been the stated policy of the New York courts for many years prior to 1916 and except for unusual cases remains the practice of the New York courts. *Curtis v. Curtis*, 185 App. Div. 391,

395 (1st Dept. 1918); *Cross* v. *United States Trust Co.*, 131 N. Y. 330, 339 (1892); *Parsons* v. *Lyman*, 20 N. Y. 103, 112 (1859); cf. *Hutchison* v. *Ross*, 262 N. Y. 381 (1933); *Shannon* v. *Irving Trust Co.*, 275 N. Y. 95 (1937).

Even if this case involved, strictly speaking, doctrines of the conflict of laws rather than a finding of intention in which conflict principles played a part, there would still be no federal constitutional question involved here. The doctrines of conflict of laws developed and applied by a state court are merely parts of the state's local common law with which this Court is not concerned.

In *Kryger* v. *Wilson*, 242 U. S. 171 (1916), this Court held, at page 176:

> "* * *. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the *situs* instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned."

To be sure, on a few occasions, in extreme circumstances, this Court has taken jurisdiction under the "due process" clause where a state court has made a palpably erroneous and unfair choice of the applicable law. But, in those cases, there was either an unwarranted failure to recognize the validity, in a conflict of laws sense, of the law of another state or an unwar-

ranted extension of the law of the forum beyond its proper orbit. *E.g., Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930). This Court's intervention was necessary in such cases to correct peculiarly conspicuous error and to avoid a divisive parochialism resulting from the application of the forum's own law. See *Sampson* v. *Channell*, 110 F. 2d 754, 759 (1st Cir. 1941), *cert. denied*, 310 U. S. 650 (1941); cf. *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 497 (1941).

Here no such occasion exists for review by this Court. Here there is no case of unwarranted application of the law of the forum; the New York courts fully recognized and applied the more pertinent law of a sister state, on the strength of ample precedent for doing so going back into days prior to the creation of this trust. There was nothing "palpably erroneous" in their decision to do so. On the contrary, that decision accorded with the great weight of authority and with the stipulated facts. *Restatement* (~~*Second*~~), *Conflict of Laws* § 296 (~~1959~~).

By failing to appeal, petitioner has conceded that in the case of the testamentary trust under Arthur B. Emmons' will, there is ample rational basis for the New York court at the situs of the trust to apply the foreign law of the domicile to the very question involved in this *inter vivos* trust (petition, pp. 12, 13). This emphasizes the frailty of petitioner's claim that there is no rational basis for such application of Rhode Island law in the case of the *inter vivos* trust.

In attempting to find some basis for its claims that the New York courts had no grounds for applying

Rhode Island law under the circumstances, petitioner says (petition, pp. 24-26) that Rhode Island could not have assumed jurisdiction over this trust and (petition, pp. 22-24) that Rhode Island law on the subject of stock dividends had not been enunciated at the time when Mr. Emmons created this trust. Even if these premises were correct—which they are not—they would be quite immaterial in this proceeding. The issue here is one of presumed intention, not one of jurisdiction to determine that intention, and even if it were assumed that the Referee was mistaken as to the state of Rhode Island law in 1916, his error would not create a constitutional question. *Nickel* v. *Cole*, 256 U. S. 222 (1921). In fact, however, Rhode Island would have had jurisdiction to determine the issues in this case had the trustee elected to initiate the proceeding in Rhode Island, and the highest court of Rhode Island had already expressed itself at least three times prior to the execution of the trust indenture by Arthur B. Emmons in 1916, to the effect that stock dividends represent principal and not income of a trust. *Newport Trust Co.* v. *Van Rensselaer*, 32 R. I. 231 (1911); *Greene* v. *Smith*, 17 R. I. 28 (1890); *Brown's Petition*, 14 R. I. 371 (1884).

This Court itself, as early as 1890, had taken cognizance of the fact that such was the Rhode Island doctrine. In *Gibbons* v. *Mahon*, 136 U. S. 549 (1890), in holding that stock dividends should be treated as principal, this Court made the following observation:

> "And in Connecticut, Rhode Island and Maine, a dividend of new shares, representing accumulated earnings, is held to be capital and not income. *Brinley* v. *Grou*, 50 Conn. 66; *Brown's petition*, 14

R. I. 371; *Richardson* v. *Richardson,* 75 Maine, 570, 574." (136 U. S. at 564).

Rhode Island Trust Co. v. *Tucker,* 51 R. I. 507 (1931)—upon a phrase from the opinion in which petitioner relies to support its contention that Rhode Island first enunciated its law on the subject in 1931 (petition, pp. 22-23, 29-30)—merely presented the problem in connection with unproductive property for the first time and did no more than extend the established Rhode Island rule to periodic stock dividends issued in lieu of cash dividends. See *Note:* "Conflicting Claims of Life Tenant and Remaindermen to 'All Stock—No Cash' Dividends," 46 HARV. L. REV., 298, 302 (1933).

In short, the record discloses that the New York courts, in seeking to ascertain and give effect to Mr. Emmons' intent, simply applied a universally approved rule of interpretation which, in view of the language employed in this particular indenture and in view of the surrounding facts and circumstances of this particular case, called for recourse to Rhode Island rules of interpretation.

The disposition by the New York courts was entirely consistent with all applicable precedent. Not only was there a completely rational basis for seeking the settlor's intention in the body of the law most familiar to him—that of his home—but there would have been little or no justification for imposing upon him and his Rhode Island beneficiaries concepts of the forum with which he and they were presumably unfamiliar.

CONCLUSION

The petition is entirely without merit, as well as jurisdictionally deficient, and should be denied.

Respectfully submitted,

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